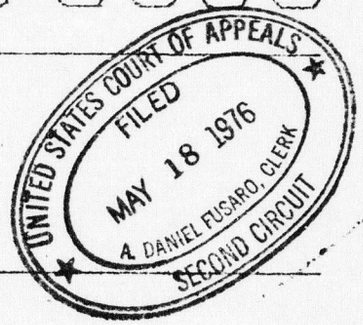
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6083



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Case No. 76-6083

THE EAST 63RD STREET ASSOCIATION, EAST 62ND STREET ASSOCIATION, 116 EAST 63RD STREET, INC., THIRD CITY CORP., CYRUS FEUER, HALSTON FROWICK, FERRUCCIO DiCORI, FRANK A. WEIL, LAWRENCE P.J. BONAGUIDI, HENRY S. GLAZIER, JAMES H. McEWEN, JR., HARVEY BRANDON, ROBERT KEARNS, JOYCE HEMION, OTTO PREMINGER, RICHARD CHAPMAN, JOHN JAY ISELIN and JOSEPHINE LEA ISELIN,

Plaintiffs-Appellants,

- against -

WILLIAM T. COLEMAN, JR., as Secretary of Transportation, U.S. Department of Transportation; ROBERT E. PATRICELLI, Administrator, Urban Mass Transportation Administration, U.S. Department of Transportation; JOHN TAYLOR, Regional Administrator, Urban Mass Transportation Administration; METROPOLITAN TRANSPORTATION AUTHORITY; NEW YORK CITY TRANSIT AUTHORITY; DAVID L. YUNICH, as Chairman of the Metropolitan Transportation Authority and of the New York City Transit Authority; HUGH CAREY, as Governor of the State of New York; ARTHUR LEVITT, as Comptroller of the State of New York; THE CITY OF NEW YORK; and ABRAHAM BEAME, as Mayor of the City of New York,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

Dated: May 18, 1976

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INTRODUCTORY STATEMENT

Plaintiffs appeal to this Court from an order of the United States District Court, Southern District of New York (FRANKEL, J.), which order denied plaintiffs' motion for a preliminary injunction against extensive excavation work, including tree removal, along East 63rd Street between Park and Third Avenues in Manhattan.

The excavation work is associated with the proposed construction of a subway station on East 63rd Street between Park and Third. The work would include and require, among other things: the sinking of more than 180 steel beams, with pile drivers, immediately in front of the residences along the Street; the open-cut excavation, with jackhammers, shovels and other heavy equipment, of the Street itself--this to last from 18 to 26 months; the removal of all the existing trees along the Street in connection with the open-cut excavation; continuing blasting, immediately below the surface and immediately adjacent to the residences, for another two years; the construction of a large truck elevator between Park and Lexington from which trucks would carry excavated rock and other material; and following construction, an extensive grating system substituting for much of the sidewalk along 63rd Street, through which waste heat from the underground station would be exhausted.

Plaintiffs sought relief in the District Court on the grounds that the defendants had failed to comply with the National Environment Policy Act [42 U.S.C. §§4321 et seq.]("NEPA"). Specifically, plaintiffs alleged that the environmental impact statement for the subway line and 63rd Street Station was deficient in that it failed to disclose or discuss the impacts noted above and in that, further, it gave no consideration to alternatives, including alternative

station configurations and construction methods that might reduce such impacts.

The District Court heard argument on May 12, 1976 (there was no evidentiary hearing), and granted a temporary restraining order at that time. However, in a 34-page decision and order issued on May 17, 1976, the Court dissolved the restraint and denied the preliminary injunction that plaintiffs had sought. In denying relief, Judge Frankel concluded that the impact statement was adequate under the circumstances and that plaintiffs had waited too long to be entitled to equitable relief.

Plaintiffs have now appealed in the belief that the District Court misapplied (or, more correctly, failed to apply) the applicable law and wrongfully denied relief to which plaintiffs are entitled if NEPA is to be enforced.

ISSUES PRESENTED FOR REVIEW

1. Whether the environmental impact statement ("EIS") for the 63rd Street Station was adequate when it did not disclose or discuss in any meaningful way the environmental impacts of the Station's construction, and when it failed to give any consideration to alternatives, including alternative construction methods?

2. Whether the EIS was adequate when its preparation was largely delegated to a local agency--here the Transit Authority?

3. Whether plaintiffs are barred from obtaining equitable relief for failure to commence this action earlier, when the EIS did not disclose the extent of construction operations; when plaintiffs, on inquiry, were consistently advised by the Transit Authority that there would be no significant excavation on East 63rd Street; and when plaintiffs' first notice of the expansive open-cut and related operations was when construction crews arrived on the scene in April 1976?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs are two residents' associations on East 63rd Street and East 62nd Street, two apartment buildings in the area, and a number of individual homeowners on 63rd Street and in the adjacent neighborhood. Plaintiffs instituted this action on May 8, 1976, in an effort to (A) protect the neighborhood from the severe impacts that will follow if the 63rd Street Station is constructed in the manner now proposed, and (B) force the careful consideration of such impacts and possible alternative courses that NEPA requires. A preliminary injunction was sought because construction crews were already excavating in the Street and had made their intention to proceed to tree cutting and major excavation clear.

After oral argument on May 12, 1976, the District

Court granted a temporary restraining order, but this was dissolved and a preliminary injunction was denied by the order of May 17, 1976. Plaintiffs appeal from the denial of the preliminary injunction pursuant to 28 U.S.C. §1291.

B. Statement of Facts

The Subway Line

The proposed station under 63rd Street (the "Station" or "63rd Street Station") is one part of a new subway line that will extend from Northern Boulevard in Queens to Central Park South at Sixth and Seventh Avenues in Manhattan. This subway line will pass westerly under part of Queens, the East River, and 63rd Street on the East Side of Manhattan and then turn south under Central Park to connect with existing subway lines on Sixth and Seventh Avenues.

The various segments of the subway line are in different stages of development. For example, the tunnel under the East River is complete, and much of the work on the Central Park section has been done. On the other hand, the segment between Park and Third Avenues, which is the subject of this lawsuit, is just getting underway; and even more starkly, the section from Third Avenue to the East River has not even been approved for final funding, much less begun. Indeed, subways are not expected to run on the line for nearly ten years, as compared to the five-year

construction period projected for the Station.

Construction of the subway line is being financed in significant part with Federal money, pursuant to the Urban Mass Transportation Act [49 U.S.C. §§1601 et seq.]. The segment between Park and Third Avenues, which includes the Station, is estimated to cost approximately $154,000,000, of which at least 40% and as much as 80% is being provided by the Federal government, through the Department of Transportation ("DOT").

The Station and its Setting

The subway line proper, as it passes under 63rd Street, will be tunnelled totally underground and will involve no surface disruption. Plaintiffs have no objection to this work, nor do they oppose the subway itself.

The subject of plaintiffs' concern is rather the 63rd Street Station--and for good reason: The impacts both during and after construction promise to be extremely severe.

At the outset, for example--though unmentioned by the District Court--the Station construction plans call for the driving of what the contractor has described as "soldier beams." [Affidavit of Ronald Schiavone, p.12]. These, to use the contractor's words, are "structural steel beams driven into the bedrock to support the concrete pavement [of 63rd Street]", and are to be placed "at approximately

10 foot intervals along both sides of the two blocks [of 63rd Street between Park and Third Avenues]." This means that more than 180 separate steel beams (and possibly as many as 300) are going to be sunk along 63rd Street, using pile-drivers, immediately in front of the residences and apartment houses located there. Needless to say, the impacts of this work alone will be substantial.

However, the driving of the "soldier beams" is only the beginning. After that, the Transit Authority intends to tear up the existing pavement on 63rd Street from Third to Park Avenues, as well as portions of the sidewalk, and excavate the street, through trenching, blasting or otherwise, to a depth of up to 10 feet. As a part of this open-cut construction activity--which is expected to last from 18 to 26 months--the Transit Authority will cut down all the existing trees along 63rd Street between Park and Third Avenues, and heavy trenching and trucking equipment would be a continuing accompaniment of construction.*

After the 18 months of open-cut excavation, the Transit Authority will temporarily cover the Street with

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* According to the District Court, the open-cut excavation will go forward in 100 feet increments. However, the fact that work may be centered in such a segment (actually 100 to 150 feet according to the contractor) will not limit the impacts to that stretch. The noise of the jack-hammers, compressors, shovels and other equipment will not stop at the 150 foot line, nor will the trucks carrying rubble or the dust or traffic tie-ups. These will extend the entire block over a period of a year or more.

concrete sections, and construction will proceed underground for an additional two to three years. During this time, there will be blasting and large-scale excavation, literally from building line to building line. All excavated rubble will be withdrawn from the trench up through a large truck elevator which will be constructed in the middle of 63rd Street between Park and Lexington Avenues. Trucks will utilize this elevator on a continuing basis, from 7:00 in the morning until 11:00 at night. Thus, for a period of from four to five years, the residents of 63rd Street will be subjected to the continuing indignities of heavy street construction.

Furthermore, the truck elevator (and its related construction) will, for a period of three to four years, block all but one lane of 63rd Street between Lexington and Park Avenues. Since East 63rd Street is already heavily trafficked, serving as a major exit road both for the FDR Drive and the Queensboro Bridge, the resulting traffic congestion and increased exhaust emissions are bound to be substantial.

When the Station is completed, the neighborhood will not be returned to its pre-construction condition. In the first instance, of course, there will be the entrances to the Station itself at Lexington and Third Avenues. But beyond this, a large part of the sidewalks along 63rd

Street will be replaced with an extensive series of metal grates. This grating is required to provide an outlet for the Station's air conditioning system; and from it will emanate the exhaust waste heat from the cooling system.

All of these impacts--both during construction and after--will, if carried forward as proposed, take place in a residential neighborhood of special character and quality. This neighborhood, which centers in this case on 63rd Street, but includes the broader area from 61st to 64th Streets, is characterized by many 19th and early 20th century townhouses and brownstones; by lines of mature plane trees along the sidewalks; by a rich history, including the home where Mayor La Guardia was inaugurated; and by a general urban beauty that is probably unique to Manhattan, if not the entire City. As such, the area comprises an urban environment of high quality and special sensitivity to disruption.

The environmental impacts of Station construction and operation on 63rd Street and the surrounding neighborhood would thus be of great magnitude; and in light of the clear Congressional mandate in NEPA that significant effects on the human environment be given detailed consideration, they are impacts that should have been accorded serious attention. However, this was never done, as we will discuss more fully below.

The Chronology Leading To This Action

The subway line was first proposed in the 1960's,

with the plan for an East Side station in the vicinity of Lexington Avenue and 63rd Street apparently fixed by 1970. In December 1970, certain of the plaintiffs met with representatives of the City and the Transit Authority regarding the 63rd Street line, and were told that while a station would be located in the area, it would not involve excavation in 63rd Street, but only at the intersections of Lexington and, possibly, Third Avenues. [Bonoguidi Affidavit, pp. 2-3; Exh. A].

By that time or shortly thereafter, the City and/or the Transit Authority had applied for federal capital grant assistance to construct the new line pursuant to the Urban Mass Transportation Act, 49 U.S.C. §§1601 et seq. This application triggered the environmental assessment mandated by NEPA for proposed major federal actions, here the decision whether or not to grant the Transit Authority millions of dollars for the construction of the Station and attendant line, with the significant impacts heretofore described.

On November 20, 1972, in conjunction with the environmental analysis purportedly being made, the Transit Authority--with no participation by DOT--held a public hearing with respect to the subway project. At this hearing, only about three sentences were directed to the 63rd Street Station, and a slide was apparently flashed

reflecting some open-cut excavation along 63rd Street, However, no detailed description of the construction work was given--either in terms of its extent or in terms of the nature of the impacts.

Nine days later, on November 29, 1972, the East 63rd Street Association, in an attempt to learn the details of construction, met with representatives of the Transit Authority at the Barbizon Hotel to discuss the proposed Station. More than 150 members attended this meeting, where they were presented with specific diagrams showing that there would be some open-cut excavation. However, these diagrams, which were provided by the Transit Authority, indicated that the open-cut operations would take place only at the intersections of 63rd Street with Lexington and Third Avenues [Bonaguidi Affidavit, pp. 3-4]. There was no indication of any significant cutting along the Street itself; to the contrary, the residents were repeatedly assured by the Transit Authority that the balance of the Station work would be tunnelled [Ibid].*

In April 1973, DOT issued what purported to be its Final Environmental Statement for the subway project, including the 63rd Street Station. In fact, however, as

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* Following the November 29, 1972 meeting, moreover, a number of further inquiries made by residents along 63rd Street were met with the same assurances--that there would be no significant surface disruption along 63rd Street [Bonaguidi Affidavit, p. 4; Exh. B to Butzel Affidavit].

stated in the introduction to the Statement (hereafter, the "EIS"), "the major portion of the work [was] taken directly from the New York City Transit Authority Environmental Analysis." Thus, the EIS constituted the work of DOT to an extremely limited degree.

Moreover, the EIS did not include any meaningful analysis of environmental impact of the station. On the contrary, aside from the identification of the general location of the 63rd Street Station, the EIS contains only three references to the Station, and the only two relative to impacts simply noted that "cut-and-cover construction" would be used for mezzanine areas. Throughout the EIS, there was no indication of the extent of these "cut-and-cover" operations; there was no mention that 63rd Street would be excavated building line to building line for two blocks; there was no indication that all the existing trees would be cut; there was no meaningful analysis of noise, traffic congestion or air impacts; there was no mention of the extensive grating systems that would replace much of the sidewalks along 63rd Street; there was no consideration of the exhaust heat; there was no real consideration of alternatives; there was, in short, in our view, no NEPA analysis for the 63rd Street Station.

Notwithstanding the limited nature of the EIS, in or after 1973 DOT gave its approval of the project and

authorized the allocation of funds to the Transit Authority in support of the project, including the 63rd Street Station.

Following approval by DOT and throughout the period of detailed design and advertising for bids, plaintiffs were provided with no further or different information regarding the proposed construction of the 63rd Street Station. To the contrary, when inquiries were made, they were always met with assurance that the Street would not be torn up [Bonaguidi Affidavit, p.5; Exh.B to Butzel Affidavit]. Thus, it was hardly surprising that plaintiffs remained of the belief that there would be no significant excavation in 63rd Street.*

In early 1976, the Transit Authority awarded contracts for the construction of the 63rd Street station, and in March 1976, the construction company arrived in the area. It was only at this time that plaintiffs learned of the extensive open-cut excavation that was planned, including the cutting of trees and the construction duration of nearly five years. Plaintiffs promptly attempted to persuade the Transit Authority to change its plans; but those efforts having failed, plaintiffs initiated this action to force the

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* In November 1975, detailed plans were apparently presented to Community Planning Board 8, which serves plaintiffs' area, and these plans may have been considered at a Board meeting. However, plaintiffs were unaware of this presentation because no notice was ever given by the Board or the Transit Authority regarding the meeting. As a result, it was only when barricades were set up that plaintiffs finally learned what was proposed.

careful consideration of impacts and the investigation of possible alternatives that the law requires and which will hopefully lead to a less disruptive plan [Bonaguidi Affidavit, pp.4-6].

C. The Proceedings and Decision Below

This action was initiated on May 8, 1976, by the filing of plaintiffs' verified complaint alleging violations of NEPA and the Urban Mass Transportation Act, and seeking an injunction against tree cutting and excavation related to the 63rd Street Station. At the same time, plaintiffs served their motion for a preliminary injunction, and by agreement of the parties, a hearing was scheduled for May 12, 1976.

Between the time the complaint was filed and the hearing was held, defendants' contractors continued to work in 63rd Street through the excavation of an extensive series of test holes, each measuring four to five feet square. Faced with this continuing work and the disruption it was causing, plaintiffs moved for a temporary restraining order when the May 12 hearing came on.

At the hearing, no evidence was presented or received--the facts being largely undisputed and argument proceeding upon the papers. At the conclusion of the argument, and in response to plaintiffs' application, the Court granted a temporary restraining order, allowing continued work in Third Avenue and completion of the test

pits already begun (both with plaintiffs' consent), but otherwise enjoining further construction activities in East 63rd Street between Park and Third Avenues. Plaintiffs, in turn were required to post a $5,000 bond.

On May 17, 1975, Judge Frankel issued his Opinion and order dissolving the temporary restraining order and denying plaintiffs' motion for a preliminary injunction.

In reaching its decision, the Court first addressed the adequacy of the EIS and concluded that while it was not perfect, it was good enough. In this regard, the Court acknowledged that the EIS did not disclose the extent of the open-cut construction work, but concluded that plaintiffs should have known this from statements made at the November 20, 1972 public hearings [Opinion, pp.11-14]. As to other aspects of the excavation and related work, the Court concluded that details were not necessary and that general references to "temporary construction impacts" and attempts to "minimize" these were sufficient [Opinion, pp.14-16].

With regard to alternatives, the Court did not address the possibilities of minimizing impacts through alternate construction methods or reducing the size of the Station. Instead, it limited its discussion to the possibility of moving the Station eastward or westward and concluded that logic would not support this [Opinion, p.17]. In addition, the Court concluded that a general reference

in the EIS to studies of station locations supposedly made by a Transit-Land Use Committee was enough to answer plaintiffs' objections.

Addressing itself to impacts following construction, the Court did not discuss the impacts of the extensive grating system, nor did it deal, except in a footnote, with the exhaust emissions [Fn.22, p.iii]. With regard to other possible effects, including possible impacts on the character of the neighborhood due to the large influx of riders, the Court concluded generally that these could have and should have been raised by the plaintiffs before, and that the impacts were speculative in any event [Opinion, pp.20-21]. Accordingly, the admitted failure of the EIS to address these issues was regarded as inconsequential.

The District Court then turned to the authorship of the EIS and noted the statement that "[t]he major portion of the work is taken directly from the New York City Transit Authority Environmental Analysis." However, the Court concluded that the further statement of DOT that "portions have been re-written whenever clarification was felt necessary, and sections were revised or added as appropriate" was sufficient to meet the requirements of NEPA that the EIS be prepared by the "responsible Federal official." [Opinion, pp.22-23].

Finally, the Court took up the "equities" involved in the case, and held that the "extreme tardiness of plaintiffs' suit" was a commanding reason for the denial of

injunctive relief. [Opinion, p.24]. In this regard, the Court again concluded that plaintiffs should have known, from the statement made at the November 29, 1972 public hearing, of the expansive nature of the construction impacts; and it refused to accept as an excuse the fact that plaintiffs, upon subsequent inquiry, had been otherwise assured by the Transit Authority. On this basis, and because of significant costs that might accrue to the defendants and their contractors if relief were granted, the Court concluded that an injunction could not be justified on equitable considerations [Opinion, pp.26-29].*

RELEVANT STATUTES

The relevant statute involved in this case--Section 102 of NEPA--is set out in pertinent part in Appendix A to this Brief.

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* The Court also implied that an injunction against the Station pending NEPA compliance would deny the public the benefits of the completed subway line. In fact, however, as noted earlier, the Park Avenue-Third Avenue Station is not the last remaining link to be built, and a delay here would not impinge significantly, if at all, on the completion date of the subway.

ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT THE DOT'S EIS WAS ADEQUATE UNDER NEPA

A. The Inadequate Consideration of Impacts

Congress through NEPA mandated that a federal agency contemplating a major action set forth in a detailed statement and "to the fullest extent possible" the environmental impacts of the action it is considering [Section 102 (2)(C)]. The statute does not speak in terms of generalities, but in the language of "detail", nor does it speak of mere "some" environmental impacts. Rather it directs that the impacts be set forth "to the greatest extent possible", and as the Court of Appeals for the District of Columbia Circuit held in Calvert Cliffs Coordinating Committee v. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971):

> "...the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for agencies, a standard which must be rigorously enforced by the reviewing courts" [449 F.2d at 1114]."

Similarly, see Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972).

The importance of presenting impacts in detail has been consistently emphasized by the Courts. Thus, in one of the first NEPA cases, EDF v. Corps. of Engineers, 325 F.Supp. 728 (E.D. Ark. 1971), the District Court observed:

> "At the very least NEPA is an environmental full disclosure law... The 'detailed statement' required by §102(2)(C) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known possible environmental consequences of proposed agency action" [325 F.Supp. at 759]. (emphasis added)

To the same effect is NRDC v. Grant, 335 F. Supp. 280, 286 (E.D. No. Car., 1973); and this Court has, on frequent occasions, emphasized that the full spectrum of factors set forth in Section 102(2)(C) must be adequately described and carefully weighed. E.L. Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 387 (2d Cir. 1975)].

Moreover, the disclosure and analysis of environmental impacts must be effected through the agency's impact statement. It is not sufficient, for example, that the agency has conducted studies on environmental impacts if such studies "were not made a part of the EIS" [Chelsea Neighborhood Associations, supra, 516 F.2d at 389]. Nor is it enough that impacts are disclosed at a public hearing if such impacts are not discussed in the EIS [NRDC v. Callaway, 524 F.2d 79, Footnote 14 at 94 (2d Cir. 1975)].

The reason that agencies are required to include their environmental assessments in impact statements is clear. The purpose of NEPA and its so-called "action forcing" impact assessment requirements was, in the words of NEPA's Senate

sponsor, "to insure that all relevant environmental amenities are considered in the calculus of project development and decisionmaking" [115 Cong. Rec. (Part 21) 29055 (1969)]. The impact statement itself is "to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of planned federal action" [Calvert Cliffs, supra, 449 F.2d at 1114].

Finally, the requirement of detailed analysis of impacts is fully applicable to an urban setting, as this Court has made clear on several occasions. Chelsea Neighborhood Associations v. U. S. Postal Service, supra; Trinity Episcopal School v. Romney, 523 F.2d 88 (2d Cir. 1975); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972). And especially where, as here, the urban environment is residential and of special quality, the obligation to address disruptive impacts must be regarded as all the more important.

Measured against the foregoing standard and the underlying Congressional mandate that environmental factors be fully and fairly considered, the EIS for the 63rd Street Station was, we submit, totally inadequate, and the District Court was clearly in error in reaching the opposite conclusion.

We begin with the acknowledged fact that essentially the entire EIS discussion regarding the impacts of constructing and operating the 63rd Street Station is set forth in the excerpts quoted on page 10 of Judge Frankel's opinion. As this

Court will note, those excerpts include only one specific reference to the Station itself, and there is no description whatever of its diverse and serious impacts. To the contrary, everything is low-key, as if the work proposed is merely ordinary-course construction.

But as we have pointed out previously, the impacts are far from ordinary-course, and they are extensive. What is involved is the tearing up of 63rd Street for 2 complete blocks, with excavation, blasting and heavy construction activities to extend for nearly 5 years, and all of this within a few feet of the adjacent residences. However, there is no disclosure of the extent of these operations -- of the sinking of piles, of the expansive excavation of the Street, of the long-term blasting, or of the lengthy period of construction -- in the EIS. Yet if the requirement for a detailed statement means anything, it certainly should include impacts of this magnitude in a residential environment.

The District Court attempted to avoid this result in a number of ways. At the outset, for example, it suggested that the impacts of construction were "relatively temporary", and that in the context of the line as a whole, the limited discussion of such impacts at 63rd Street was understandable. However, there is nothing in NEPA that exempts an agency from describing and evaluating construction impacts -- and especially

where, as here, the effects are far from normal. In the instant case, after all, construction is not going on in a lot across the street or a block removed; it is being carried on with heavy equipment and blasting right in front of residential homes -- and for a period of five years. What is involved, in short, is major disruption. If it were simply street repair or normal construction, detailed consideration would probably not be required. But where, as here, the effects are bound to be severe -- where the Station involves a greater impact on the human environment than almost any other part of the overall line -- NEPA requires that they be addressed in detail.*

Furthermore, in terms of the overall line, the fact is that the principal potential for adverse impacts was found in only two settings -- the parks and the residential station at 63rd Street. Otherwise, construction was largely to be completed by tunnelling -- a process that involved few impacts. But at 63rd Street and the parks, where open cut construction was being undertaken, there was clearly the potential for serious impact. Here, then, logically, is where

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* We also note that in much less serious situations, construction impacts are commonly discussed in detail in impact statements. In the case of the Chelsea VMF, for example, five pages of text and an appendix were devoted to construciton impacts (primarily noise), notwithstanding that the nearest residences were much further removed than those involved here.

attention should have been directed. Yet while relatively detailed consideration was given to the parks, essentially none was given to 63rd Street. In such a major project, to have ignored impacts where they could be expected to be the most severe -- i.e., at 63rd Street -- was, we submit, in clear error.

The District Court also sought to overcome the failure of the EIS to disclose the extent of excavation work by the fact that at the November 20, 1972 public hearing, the scope of the excavation was assertedly described in a slide flashed on a movie screen, with a brief one-sentence commentary by a Transit Authority official.* Clearly, however, such a slide, which was there only for a moment and was accompanied by the most general statement, cannot be regarded as the detailed disclosure and analysis that NEPA requires. Rather, it was simply a gimmick.

Of equal importance, this Court has held that disclosures at public hearings which, as here, are not made part of the EIS do not satisfy NEPA. Thus, in NRDC V. Callaway, supra, this Court found a district court in error for relying

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* In fact, as we understand it, the slide was actually a cut-away profile of the entire line through Manhattan, with the Station cut-marked in yellow on two small blocks. It was in no way a picture of the excavation or the area to be excavated.

on a description of an alternative site for dredged spoils made at public hearing but not included in the impact statement. As the Circuit Court said:

> "The district court's conclusions [as to economic cost and technical feasibility] were based not on detailed statements made in the EIS but on part of a transcript of public hearings that was never circulated to agencies or to the public for scrutiny. At the very least the information used by the district court should have been included in the EIS so that its accuracy might have been open to test and discussion." [524 F.2d Footnote 14 at 94].

Similarly, the information as to the extent of cut-and-cover construction should, at the very least, have been part of the EIS here. Even then, of course, that information in the form of a colored chart or map in the EIS would be, standing alone, still far from the detailed assessment mandated by Congress. Nothing would still have been said about the nature of cut-and-cover construction, the truck elevator or the period of construction.

The District Court also concluded that DOT need not have elaborated on its references in the EIS to "temporary disruption of traffic and utilities, traffic congestion, community service disruptions, as well as, construction noises, dusts, solid wastes and spoils disposal." [Opinion, p.15]. The meaning of these phrases are, in the words of the District Court, "evident to all the world." [Opinion p.15].

Plaintiffs would concede that every modern city dweller understands and can foresee the nature of the

environmental impacts that will result from the excavation of a hole in a city street. Traffic congestion, disruption of utilities, noise, dust and waste could be anticipated. The construciton of the station here in questions, however, does not involve a mere hole in the street. It contemplates, as detailed elsewhere in this memorandum, among other things: two blocks of open pit excavation going on for at least 18 months; continued blasting for 3 more years; the sinking of 180 steel piles at 10 foot intervals along 63rd Street; and a truck elevator in the middle of the street. None of these elements are subsumed, even in the mind of a city resident, under limited street excavation and conceivable impacts. To rely on the bland generalizations of the EIS as to impacts (and these impacts are associated in the EIS with cut-and-cover construction as a whole, not the construction of the 63rd Street Station in particular) is certainly to ignore the specific mandate in NEPA for a detailed statement of impacts. As this Circuit said in Monroe County, supra, "The statutory mandate [of NEPA] is not fulfilled by vague generalities, or pious and self-serving resolutions or by assuming that someone else will take care of it" [472 F.2d at 700].

Moreover, the fact that the exact specifications for the proposed station may not have been known in 1973 when the EIS was prepared cannot excuse the defendants, as the District Court suggests [Opinion, p.14], from making the

required detailed assessment. First of all, defendants themselves assert that prior to the publication of the EIS, they, or at least the Transit Authority, did reveal the extent of cut-and-cover construction at the public hearing. Defendants cannot have it both ways. If they knew and revealed the extent of proposed excavation before the EIS was issued, they were certainly in a position to assess fully the impacts of such excavation in the EIS.

And even if exact specifications were uncertain in 1973, defendants were not freed of responsibility for assessing impacts of possible station configurations and construciton methods. Thus, in Chelsea Neighborhood Associations, supra, the Court did not allow the U. S. Postal Service to escape its responsibility to assess the impact of a proposed housing project because its precise configuration and size were unknown. As the Court said:

> "We agree that the Service can only do the possible, but the total number of apartment units has been approximated and an evaluation of probable environmental impact need not await final detailed design" [516 F.2d at 388].

Similarly, in the present proceeding, where the defendants certainly knew the general nature of the construction work -- where pilings, obviously, would have to be sunk, where extensive long-term blasting would be required, and where the constraints of the street necessitated work up to the residential property lines -- defendants clearly could

have provided a meaningful description of the likely impacts. The District Court erred in failing to apply this requirement.

The District Court also erred in its conclusion that because defendants stated in the EIS that they would try to minimize environmental impacts and have, in fact, sought to do so to some extent, plaintiffs' right to injunctive relief was somehow diminished. This makes no sense; for one of the principal purposes of NEPA is to disclose and describe the impacts that cannot be avoided in the action as proposed, so that the public and the decisionmakers can look to alternatives that might reduce or eliminate the effects. If an agency could free itself of this disclosure obligation by simply making some efforts to reduce (or say it would try to reduce) the impacts, the whole NEPA process, with its requirements for outside agency input and public awareness would be short-circuited.

The present proceeding proves the point. In the space of two weeks, plaintiffs, after finally being made aware of the true extent of proposed Station construction, have made several suggestions for reducing impacts of the proposed action. For example, they have proposed using the existing construction shaft at Fifth Avenue instead of a new elevator further east; they have suggested means of reducing the size of the Station, and thus the required open-cut work, by eliminating the expansive air-conditioning system or

reducing the number of exits; and they have raised the possibility that a different configuration for the Station might also be feasible. None of these suggestions have been shown as technically infeasible; and had the true extent of the excavation been known before, as mandated by NEPA, many of these suggestions might have been proferred long ago. By reason of the non-disclosure, however, the NEPA process was aborted.

Finally, with regard to impacts, the EIS failed completely to discuss the actual possible impacts of the completed Station on the neighborhood in and surrounding 63rd Street. Thus, there is not a word said about the extensive granting system that would have to be constructed along the sidewalks of 63rd Street, nor of the air conditioning exhaust that would presumably emanate from these grates. Yet it is apparent that this type of extensive metal work, and the waste heat coming from it, could have a severe impact on the neighborhood, especially in the summer; yet the EIS is silent on these scores.

As for the District Court, it did not address the extensive grating that would have to be added; and as to the heat exhaust, its sole observation -- in footnote 22 -- was that "while it might have been better for the EIS to discuss this (and presumably to conclude that some extra heat

outside is a fair price to pay for the comfort underground), the omission is minor at most." Yet, the exhaust of excess heat could have a measurable impact on 63rd Street -- witness walking on any Avenue, outside air conditioner exhausts, in the summer; and the balancing was for the agency, not for the Court. However, all of this was lost because the EIS was silent.

And that in the end is key. For one of the major points of NEPA and the EIS requirement is to ensure that the decisionmaker has before him a listing and analysis of the potential impacts, as well as the possible options, so that environmental values can be taken meaningfully into account and the decisionmaker will be able to make a reasoned choice. NRDC v. Callaway, supra, 524 F.2d at 92; Chelsea Neighborhood Associations, supra, 516 F.2d at 389. Here, the decisionmaker could have known neither the impacts nor the options, since neither were included in the EIS, and thus a reasoned choice -- indeed, any kind of informed choice -- was impossible. When the District Court "legitimized" this approach, it acted in error.

B. The Inadequate Consideration of Alternatives

NEPA specifically requires that an EIS include a "detailed statement" of "alternatives to the proposed action." [42 U.S.C. § 4332 (2)(C)] This requirement is underscored by

the Council on Environmental Quality's Guidelines for the Preparation of Environmental Impacts Statements [40 C.F.R. §§ 1500.1 et seq. (1973)] which call for a "rigorous and objective evaluation of the environmental impacts of all reasonable alternative action" [40 C.F.R. § 1500.8(a)(4)].

The consideration of alternatives has, in fact, been characterized as the "linchpin of the entire impact statement" [Monroe County, supra, 472 F.2d at 697-98]. And in a recent decision, the Second Circuit said:

> "It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives" [NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975)].

In light of the importance given the detailed assessment of alternatives by NEPA and the courts, the EIS here in question is clearly deficient. The EIS devotes only four and one-half pages to the entire question of alternatives, and the Station is addressed only in passing [EIS, pp. 43-44].

Nothing is said in the EIS, for example, about the possibility of locating the Station elsewhere on the East Side or eliminating an East Side station altogether. No assessment is made of alternative sites further east on 63rd Street, as at Second Avenue, or further west adjacent to Central Park.

There is no consideration whatever of providing only one set of entrances to the Station, at either Lexington

or Third Avenues, which might well reduce the required amount of excavation. Nor is anything said in the EIS about the possibility of eliminating air conditioning. If this were done, many of the proposed equipment rooms could be eliminated, which in turn could reduce the required cut-and-cover excavation.

The EIS likewise fails to consider the possibility of building the extensive service spaces north-south along Third Avenue or Lexington Avenue instead of east-west along the more residential 63rd Street.

Finally, nothing is said about the possibility of utilizing the existing rubble removal shaft in Central Park instead of building a truck elevator right in the middle of 63rd Street between Park and Lexington Avenues as is now proposed.

Among the suggested alternatives, all may not prove feasible. However, particularly in the area of alternative construction methods and station configurations, there is much that might be accomplished. Yet the District Court entirely ignored the failure of the EIS to address such construction and configuration alternatives. Thus, the Court never came to grips with anywhere near the full-range of available options.

Instead, the District Court focused on only one alternative raised by plaintiffs -- the possibility of relocating the Station further east or west; and even as to that alternate, the Court acknowledged that the EIS was completely silent

[Opinion, p.17]. However, the Court undertook to judge for itself the validity of the present location -- and found it preferable. Yet this is not, we submit, the Court's appropriate role. It is rather for the agency to give the consideration, and here there was no indication in the EIS that it did.

Perhaps recognizing this deficiency, the District Court then invoked a reference in the EIS to a "Transit-Land Use Committee" to buttress the Court's own conclusion. But it is just this sort of off-hand reference in an EIS to impressive-sounding committees and studies that has been rejected by this Circuit. Thus, in Chelsea Neighborhood Associations, supra, this Court said:

> "...the [Postal] Service argues that since studies over the past decade all agree on the need for a consolidated VMF, certain alternatives could be rejected in the EIS without detailed analysis. But these studies were not made part of the EIS and so invocation of them cannot alone 'permit a reasoned choice of alternatives.' Natural Resources Defense Council, Inc. v. Morton, 148 U. S. App. D.C. 5, 458 F.2d 827, 836 (1972). Without a more detailed analysis of the rejected alternatives the community and other agencies will have no way of checking on the validity of the Service's conclusions" [516 F.2d at 389].

The EIS in the instant case was even weaker than that of the Postal Service in the Chelsea case in regard to alternatives, since, as the District Court found, there was no reference to alternative east-west station locations in DOT's EIS, while the Postal Service's EIS had at least passing reference

to alternative garage sites. It should also be noted that the language quoted in the District Court's opinion concerning the Land-Use Committee, did not even appear in the section of the EIS devoted to alternatives.

In fact, anyone reading DOT's EIS, whether he or she be a member of the concerned public, an outside agency or the DOT decisionmaker, would have no way of knowing what input and information the Transit-Land Use Committee had given. The input may have been "of great value" to those selecting the "final" location of the Station, but such input was never made available through the EIS, so the public and outside agencies were left in the dark.

Lastly, the District Court invoked the "rule of reason" in justifying the non-consideration of the alternative station location. However, as the Court of Appeals for the District of Columbia Circuit has stated:

> "...implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to 'the fullest extent possible.'" [Scientists Institute for Public Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973)].

Here, of course, there was no compliance at all, as there was no discussion whatever of alternatives. Under the "rule of reason" or any other test, this was clearly insufficient [NRDC v. Callaway, supra, 524 F.2d at 93, fr. 13]; and the District Court erred when it purported to find otherwise.

POINT TWO

THE DISTRICT COURT ERRED IN FINDING THE EIS ADEQUATE DESPITE THE FACT THAT, AS A PRACTICAL MATTER, IT WAS AUTHORED BY THE TRANSIT AUTHORITY RATHER THAN DOT

Under NEPA, it is the "responsible [federal] official" that is required to prepare the EIS [42 U.S.C. § 4322(2)(C). The "responsible" official in this case was DOT, which had responsibility for approving the application for aid under the Urban Mass Transportation Act. DOT, however, did not really prepare the EIS. Rather, it simply compiled the Statement, drawing from studies made by the Transit Authority. Thus, as DOT stated in the Foreward to the EIS, "[t]he major portion of the work is taken directly from the New York City Transit Authority Environmental Analysis."

Such a delegation to a local agency with an obvious built-in bias in favor of its own application for a multi-million dollar grant cannot be justified. This Circuit had long frowned on the practice before the recent enactment of the amendment to NEPA [P.L. 94-83] which was designed to override Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974). That amendment, however, does not apply in this case since by its terms, it only has application to state agencies having statewide jurisdiction. The Transit Authority does not fall into this category, and accordingly could not properly prepare the environmental impact statement.

In similar circumstances, the Second Circuit has made it clear that the Federal agency cannot delegate its duties of NEPA analysis. Thus, in Trinity Episcopal School, supra, the Court criticized the U. S. Department of Housing and Urban Development for relying solely on conclusions of the New York City Housing Authority as to alternative housing locations. The Court said:

> "In Greene County Planning Board v. F.P.C. [citations omitted] we noted the danger of accepting without question the self-serving statements or assumptions of local agencies in connection with the preparation of EIS's. The danger is equally apparent where an agency like HUD accepts an unsupported statement as to lack of any alternatives from 'interested' local agencies." [523 F.2d at 94].

In this instance, DOT relied to an equal extent on the statements of the Transit Authority and, in that regard, we submit, violated NEPA.

The District Court concluded, however, that there was no violation, relying on the further statement in the Foreward to the EIS that "[p]ortions [of the statement] have been rewritten wherever clarification was felt necessary, and sections were revised or added as appropriate." However, this type of compilation approach is a far cry from the meaningful and continuing involvement of the responsible Federal official that the statute requires. If the EIS were in greater detail, perhaps then, the basic acceptance of the Transit Authority analysis might have been justified. But where, as here, the presentation

was so vague and general, there was an overriding need for DOT to become extensively involved. Here, by its own words, it did not; and that being the case, it did not, we submit, fulfill its duties as the "responsible Federal official."

POINT THREE

THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS WERE NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE OF THEIR TARDINESS IN FILING SUIT

The District Court found that plaintiffs were guilty of "tardiness" in not keeping themselves informed of the actual extent of cut-and-cover construction proposed for the Station and not bringing this action challenging the sufficiency of the EIS until three years after its issuance. Plaintiffs have, according to the court below, been guilty of inexcusable delay which, coupled with the "devastating paralysis" of subway construction that injunctive relief would involve, deprives plaintiffs of the right to such relief.

The facts set forth in the papers submitted to the district court, however, paint an entirely different picture. As evidenced by the Affidavit of Lawrence P. J. Bonaguidi and described in detail at the outset of this memorandum, plaintiffs made strenuous efforts to keep themselves informed of the true state of affairs. As early as November 17, 1970, members of The East 63rd Street Association met with representatives

of the Transit Authority to discuss the plans for the subway station at 63rd Street. At that meeting, and again on November 20, 1972 (at a meeting attended by 150 community residents), plaintiffs were assured that cut-and-cover excavation would be limited to the area on 63rd Street immediately adjacent to Third and Lexington Avenues. In fact, at the 1972 meeting, diagrams describing excavation very much more limited than that flashed across the screen at the public hearing (held nine days earlier) were produced. And at least three other private inquiries to the Transit Authority produced similar responses attesting to the limited nature of cut-and-cover excavation.

By contrast, defendants demonstrated no such willingness to have the true impacts of excavation revealed. The total extent of the "disclosure" made at the November 20, 1972 public hearing and in the EIS has been discussed. The hearing consisted of a flashing slide and a one sentence description by the Transit Authority representative. Moreover, the November 1975 meetings between the Transit Authority and the local Community Planning Board on which the Court below placed much emphasis, were not public hearings open to plaintiffs, but rather the same sort of "private audiences" condemned by the court below elsewhere in its opinion. According to Colonel O'Neill's Affidavit, it is not even clear that the full

Planning Board, much less the interested public, was present, and plaintiffs were clearly not invited or advised of what transpired. Plaintiffs only learned of the true nature of excavation in April 1976, and then wasted no time in pressing their case and bringing this action.

In sum, it is not plaintiffs who have been deaf, but defendants who have been mute, at best. In such circumstances, it was error for the District Court to find that plaintiffs had no excuse for their failure to file suit in 1973 and to penalize plaintiffs for the defendants' failure to describe the full extent of the project it had in mind. While the lower court is certainly right in saying that defendants had no duty to inform plaintiffs of the day-to-day progress of the subway, here defendants, through the NEPA process and otherwise, clearly misinformed plaintiffs of the impending impacts.

It follows that, as plaintiffs were misled as to the basic construction impacts on their homes and lives, they would not be motivated to look deeply at the EIS in regard to other impacts and alternatives. Plaintiffs were, in effect, lulled into a false sense of security by the defendants' minimization of the basic harm.

On the other side of the ledger, it was contrary to the evidence for the District Court to conclude that granting injunctive relief against the Station would paralyze

the construction of the subway line. Completion of the Subway line as a whole is not expected for ten years. Federal funding for the section of the line from Third Avenue to the East River has not yet even been approved and construction of that segment is quite far off. Plaintiffs are not asking that the Subway line be shifted to a street either north or south of 63rd Street, the only element which is clearly "locked in" by the line's construction to date. In these circumstances, the time required to prepare a meaningful EIS and to see whether impacts can be reduced or eliminated will not interfere significantly, if at all, with the projected use of the subway line.*

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* These facts distinguish the present proceeding from the Conservation Society, supra, case cited by the lower court [Opinion, p.27] with respect to the cost of further delay. The construction of Sleepers River interchange which the Circuit Court was addressing in the language cited in the lower Court's opinion, was the only part of a highway project still incomplete. Severe traffic problems were resulting from the failure to complete the interchange. There were no apparent alternatives to the construction of that interchange. In the present proceeding, by contrast, operation of the subway line is ten years in the future, substantial parts of the line are incomplete, environmental impacts will result from the Station and not its absence, and feasible alternatives do exist. The factors addressed in the Sleepers River controversy simply do not exist here.

Thus, if the court below had correctly balanced the reasons for appellants' "delay" in bringing suit against the limited impact of the requested injunction on construction of the subway line as a whole, it could not have concluded, as it did, that plaintiffs were barred from any relief by "tardiness."

Furthermore, the real question, as this Circuit said in Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975) is not how much earlier plaintiffs might have sued, but whether injunctive relief pending compliance with NEPA would serve the purpose of that Act. Steubing involved an action to enjoin construction of a highway bridge across the middle of Lake Chautauqua in western New York State. Plans for the bridge were long standing, millions of dollars had already been spent in construction planning and construction had actually begun when the plaintiffs sued to enjoin construction because of DOT's failure to prepare an impact statement. The Court found that, despite the expenditure of funds and the late date of the action, construction of the bridge should be enjoined. In reaching this decision, the Court determined that the plaintiffs, who had been advised by defendants that no EIS was necessary, had the right to assume the federal agencies would comply with NEPA and were not barred by the fact construction was already underway.

The Courts have not hesitated to enjoin major federal projects for failure to comply with NEPA despite the prior expenditure of substantial sums and the Government's claims of laches. Thus, in I-291 Why? Ass'n v. Burns, 372 F.Supp. 223 (D. Conn. 1974 aff'd 517 F.2d 1077 (2d Cir. 1975), the District Court (affirmed by the Second Circuit) enjoined construction of an 8-mile segment of highway where the EIS had been filed a year before the suit was commenced and construction was well underway. Similarly, in Ecology Center of Louisiana v. Coleman, 515 F.2d 860 (5th Cir. 1975), the Court enjoined construction of a highway for the failure of DOT to prepare an adequate EIS despite the expenditure of a million dollars on land acquisition and a two-year lapse between the issuance of the EIS and the filing of a suit challenging its insufficiency. And in Arlington Coalitiion on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972), the Court enjoined further construction of a highway for DOT's failure to issue an EIS despite the expenditure of $28 million on land acquisition and the fact that the proposed route of the highway had been well-known for years. [Accord: Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); EDF v. TVA, 468 F.2d 1164 (6th Cir. 1972)].

The Courts, in sum, are generally unwilling to dismiss challenges to NEPA statements on grounds of laches [Save

the Courthouse Committee v. Lynn, 8 ERC 1209 (SDNY 1975)] and will not excuse compliance with that Act by federal agencies because of the tardiness of parties in raising the issue [City of New York v. United States, 377 F.Supp. 150 (EDNY 1972).

In the instance case, moreover, there are stronger policy reasons than usual at work. For here, it is the failure of DOT and the Transit Authority to disclose the extensive construction work along 63rd Street -- including their failure to say anything about this in the EIS -- that left the public and plaintiffs in the dark and ultimately resulted in legal action being brought only at the eleventh hour. If, under these circumstances, defendants are allowed to proceed nonetheless on a theory of laches or tardiness, they would effectively be rewarded for having violated the law and having kept the impacts secret. This Court should not countenance such a result; nor should it permit as gross a failure of the NEPA process as has taken place here.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed and the lower court directed to issue an injunction against further excavation and construction on 63rd Street until the requirements of NEPA are met.

Dated: New York, New York
May 18, 1976.

Respectfully submitted,

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NEPA, Section 102 [42 U.S.C. § 4332]

"Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewise jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * *